

Panamthanath Murali (Migration) [2020] AATA 3916 (22 July 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Sinesh Panamthanath Murali
CASE NUMBER:	1726753
HOME AFFAIRS REFERENCE(S):	BCC2017/1768940
MEMBER:	Helen Kroger
DATE:	22 July 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations

Statement made on 22 July 2020 at 2:29pm

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – applicant was not the holder of a substantive visa at the time of application – medical circumstances that relates to the sponsor– consistent intent to have a family– compelling reasons exist – Schedule 3 requirements waived —decision under review remitted

LEGISLATION

Migration Act 1958, s 65

Migration Regulations 1994, r 1.15, Schedule 2, cl 820.211, Schedule 3

CASES

Babicci v MIMIA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 18 May 2017 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d) of the Migration Regulations, namely that the application was not made within 28 days after the relevant day, the relevant day being the last day the applicant held a substantive visa.
4. The applicant appeared before the Tribunal on 21 July 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Ms Balakrishnan.
5. The applicant was represented in relation to the review by his registered migration agent. The applicant provided the Tribunal with a copy of the delegate's decision for the purpose of review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

7. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
8. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

9. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
10. The applicant, Mr Murali, lodged an application for a UK Partner (Temporary) and BS Partner (Residence) visa on 18 May 2017 on the grounds of being in a spousal relationship with Ms Cinku Balakrishnan, an Australian permanent resident. Mr Murali first arrived in Australia on a student visa on 18 November 2008 that ceased on 20 December 2010. A second student visa was granted that ceased on 28 May 2016. An application for a further visa was lodged

on 22 May 2016, that was refused by the Minister's delegate and a review of this decision was sought on 20 August 2016. This partner visa application was later lodged on 18 May 2017 with an associated Bridging Visa C granted. The applicant's migration history, as set out in the delegate's decision record, was put to Mr Murali at the hearing, and Mr Murali did not dispute the delegate's findings that he did not hold a substantive visa at the time of this partner visa application.

11. The delegate invited Mr Murali to comment on these circumstances on 27 June 2017, providing the opportunity for the applicant to make a submission regarding whether there were any compelling reasons that he wished the delegate to take into consideration along with the opportunity to submit any supporting documentation to his claim that he was in a spousal relationship with Ms Balakrishnan.
12. In his response to the delegate, Mr Murali explained that he met the sponsor on a matrimonial website in 2016, that the parties committed to a long term relationship in January 2017 and that they married in Melbourne on 17 March 2017. In his submission to the delegate, Mr Murali indicated that his sponsor, a permanent resident, was seeking work as an Accountant and that the parties were endeavouring to have a family, and that he was her only family and support in Australia. He spoke to the emotional hardship that they both would incur if he was required to move off-shore to apply for his partner visa application.
13. The applicant, Mr Murali does not dispute that the partner visa application was not made within the 'relevant day', namely within 28 days of holding a substantive visa, as his last substantive visa, a student visa, ceased on 28 May 2016.
14. As the visa application was not made within 28 days of the 'relevant day', the applicant does not satisfy criterion 3001.

Compelling reasons

15. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria. The Tribunal considered the relevant circumstances of the parties, with regard to the circumstances at the time of application and their claimed circumstances post application and time of decision. The Tribunal also noted the visa applicant's migration history.
16. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babici v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
17. The Tribunal invited the applicant to provide any further evidence to support the parties' claim that compelling circumstances exist that apply to a Schedule 3 waiver. The applicant, Mr Murali spoke to the compelling circumstances that existed during the hearing, the circumstances around the time when he submitted this partner visa application in May 2017, and the nature of the circumstances since the visa application.
18. The applicant and sponsor are each 43 years of age and addressed the compelling circumstances in the context of their age. The parties claim they met in 2016 through a matrimonial website that is culturally sensitive to the Indian community. The applicant was in Australia awaiting the review of a student visa application and the sponsor lived in India. The

sponsor was granted an Australian permanent residency to work as an Accountant in Australia and moved to Australia in March 2017, and the parties married on 17 March 2017.

19. In its consideration of whether compelling circumstances exist to waive the Schedule 3 criteria, the Tribunal has not made a determination as to whether the parties are in a genuine and continuing relationship, as set out in r.1.15 of the Act.
20. Documentation was provided to the Tribunal before the hearing that included a summary statement from the applicant through his lawyers, a statement written on *theAlfred* letterhead confirming that the sponsor, Ms Balakrishnan had been referred to the Endocrine Clinic on 27 May 2020, tax invoices from Melbourne Pathology for a semen analysis and specialist pathology medical services, dated 10 January 2019 and 8 March 2019, a tax invoice from a Radiology Clinic, dated 27 August 2019, and a prescription for a course of drugs for a 10 day period indicating its application prior to thyroid surgery.
21. Both the applicant and the sponsor spoke to the documentary evidence submitted and listed above. The parties submitted that the sponsor was suffering from an enlarged thyroid that required surgery. The sponsor has been referred for surgery to *theAlfred* and they explained that she had been waiting for confirmation from the hospital for a confirmed date for the surgery. The parties explained that in the meantime, doctors have prescribed medication that could potentially adversely harm any pregnancy and that the sponsor has been advised not to become pregnant whilst on the thyroid medication.
22. The parties both indicated at hearing their interest in having children and their concern about their ages and that if the applicant was required to go offshore to apply for a visa, and that the sponsor needed to remain in Australia for medical reasons, that they would never be able to have children because of their advancing ages. The parties indicated that the standard of healthcare the sponsor would receive in Australia was superior and that she would need to stay in Australia to await the thyroid surgery. The Tribunal has carefully considered the evidence submitted in relation to the sponsor's medical needs for surgery and is satisfied that she is on a waiting list for surgery and given the changes made to elective surgery with the outbreak of Covid 19 in Victoria, that this surgery has not been available since diagnosis.
23. The parties individually and consistently submitted that they are both interested in having children, that this is not possible till after the sponsor undergoes thyroid surgery, and that if the applicant was to move back to India, that they would potentially have to wait 2 to 3 years before they were together to try and have a family. Given the age of the parties, they indicated the concern that this time delay might have on them being able to have children. They also indicated that the sponsor does not have any family in Australia who could support or look after her should the applicant be required to go offshore. The parties indicated that the sponsor would not be able to travel with him because she had secured a good job as an Accountant after a six month period of looking, and that she would be unable to find something that compared in India. The sponsor also indicated that she would not be able to access the necessary medical care she required, and that travel immediately after the thyroid surgery would not be possible because of her depleted immune system and the extent that she would be more exposed if she travelled or moved to India. The Tribunal has considered this explanation and whilst it does not find that the threat of Covid 19 infection is necessarily higher outside Melbourne, given the risk profile of community transmission in Victoria, it finds that it would be more difficult for the sponsor to immediately travel or join the applicant, should he move offshore, because of her medical condition.
24. Whilst the Tribunal accepts that it is not unusual for parties to be disappointed and emotionally affected if the applicant was required to apply for a partner visa offshore, and that such a circumstance may induce a degree of economic hardship, the Tribunal has given

careful regard to the medical circumstances that relates to the sponsor, the emotional support provided to her by the applicant to manage the current circumstances whilst awaiting a date for surgery, the personal support she will need post-surgery and their wish to try and have children when the sponsor is no longer taking the current medication. The Tribunal is satisfied that the timing of these medical arrangements imposes restrictions on them that they cannot necessarily control and the evidence before the Tribunal indicates that the parties have demonstrated a consistent intent to have a family, a circumstance that could potentially impacted should the applicant be required to move off-shore to apply for a partner visa.

25. The Tribunal has carefully considered all the evidence before it as outlined above and finds that the sponsor's medical reasons as indicated, provide a compelling reason to waive the Schedule 3 criteria. Notwithstanding the above, the Tribunal also considered a number of other circumstances which might be fairly considered 'compelling' though there was no need for the Tribunal to record these in detail, and one compelling reason is sufficient under the law.

26. **FINDINGS**

27. The Tribunal has considered the applicant's claimed circumstances, and is satisfied that the reason stated above is a compelling reason for not applying the Schedule 3 criteria in this case.
28. The Tribunal is satisfied that there is a compelling reason for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl.820.211(2)(d)(ii).
29. Given the finding above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

Helen Kroger
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.